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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAVE OUR CUMBERLAND MOUNTAINS, INC.,
Petitioner,

v.

MANUEL LUJAN, Secretary,
UNITED STATES DEPARTMENT OF INTERIOR, *et al.*

and

NATIONAL COAL ASSOCIATION and
AMERICAN MINING CONGRESS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS NATIONAL COAL ASSOCIATION AND AMERICAN MINING CONGRESS IN OPPOSITION

Of Counsel:
WILLIAM E. HYNAN
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

EDWARD M. GREEN
STUART A. SANDERSON
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

JOHN A. MACLEOD *
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Respondents National Coal Association and American Mining Congress

* Counsel of Record

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BRIEF OF RESPONDENTS NATIONAL COAL ASSOCIATION AND AMERICAN MINING CONGRESS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The opinion below (*Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541 (D.C. Cir. 1992), Pet. App. 1a-22a) fairly sets forth the history of this litigation and the facts necessary to the disposition of this petition.

Respondents National Coal Association and American Mining Congress ("NCA/AMC") seek to emphasize only a few points which require clarification in light of Petitioner's statement of the case.

1. The so-called private settlement agreement at issue in this case is of unprecedented scope, as the court below found. 963 F.2d at 1552, Pet. App. at 21a ("We came upon no reported case . . . in which another court has allowed an environmental group to maintain a citizen suit as far-reaching as SOCM's"). Although the petition now tries to make the 1990 Settlement Agreement more legally palatable by characterizing it modestly, Pet. at 6, Petitioner Save Our Cumberland Mountains, Inc. and its now-defunct co-plaintiff Council of Southern Mountains, Inc. (collectively "SOCM") have not always been so understated. They gave the court of appeals a markedly different account of the Settlement Agreement, describing it as "a detailed, comprehensive road map for the government's enforcement of the Act" that was "intended to . . . set[] forth the measures defendants would be undertaking to fulfill their enforcement responsibilities under SMCRA." Brief of Appellees Save Our Cumberland Mountains, Inc., *et al.* (Jan. 31, 1992) at 3-4. In short, the Settlement Agreement embodied SOCM's vision of how the Secretary must regulate.

The Settlement Agreement itself—a 39-page, heavily footnoted and cross-referenced document with 12 sections comprising over 60 subsections and 2 attachments—bears out this description of SOCM's ambitious goals. In painstaking detail it defined and limited the Secretary's activities and made SOCM a partner in decisions relating to the federal relationship with primacy states under the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq.* ("SMCRA" or "Act"), the operation of the Interior Department's computerized system (the Applicant Violator System, or "AVS") for cross checking applicants for surface mining permits with persons with

outstanding violations or unpaid penalties or fees, and the establishment and execution of enforcement policy. Indeed, at the time of the Settlement Agreement, this litigation had already been the driving force behind three major sets of Interior Department regulations creating and implementing the AVS. *See* 53 Fed. Reg. 38868 (1988); 54 Fed. Reg. 8982 (1989); 54 Fed. Reg. 18438 (1989). In addition, the Settlement Agreement itself purported to require the agency to engage in further rulemakings concerning the use of the AVS, the processing of permit applications, and the imposition of individual civil penalties in conjunction with incomplete or inaccurate applications. The Secretary had initiated some of those rulemakings prior to the decision below, and one of them is still officially under consideration. *See* 56 Fed. Reg. 48924 (1991) (*withdrawn by* 57 Fed. Reg. 47431 (1992)); 56 Fed. Reg. 45780 (1991).

Concern over the sweeping nature of the Agreement prompted the court below to recall, as a "fundamental consideration" for determining the district court's jurisdiction to approve the Agreement, that:

> [C]ourts customarily adjudicate episode- or area-specific controversies; federal judges, applying federal legislation, generally adhere to that mode of adjudication absent clear instruction from Congress—as in the case of review of rulemakings setting nationwide standards—that more encompassing action has been committed to the judges' charge.

963 F.2d at 1543-44, Pet. App. 4a. The court applied this principle. Noting that federal courts "do not engage long-term in grand scale supervision of an executive agency's administration of federal programs," the court unanimously held that the district court lacked jurisdiction. *Id.* at 1551, Pet. App. 20a (citing *Heckler v. Chaney*, 470 U.S. 821 (1985); *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990)). In sum, this was not an everyday settlement of a limited private law-

suit, but an agreement whose scope raised serious questions about separation of powers and the breadth of judicial oversight.

2. NCA/AMC's intervention in this case in 1989 was timely, as the district court found. NCA and AMC are national trade associations whose members include producers of most of the Nation's coal, metals, and industrial and agricultural minerals, as well as manufacturers of mining and mineral processing machinery and equipment, and the engineering, contracting, and banking firms that serve the mining industry. When SOCM commenced this litigation in 1981, NCA/AMC refrained from intervening because the suit ostensibly had the limited goal of bringing certain scofflaw operators into compliance with SMCRA. *See Save Our Cumberland Mountains, Inc. v. Watt*, 550 F. Supp. 979, 980 (D.D.C. 1982), Pet. App. at 33a. At that time, NCA/AMC reasonably believed that the interests of their operator members, who are established and responsible mine operators, were not adversely affected by the litigation. As the court below recognized, 963 F.2d at 1546 n.6, Pet. App. at 9a, NCA/AMC did not realize until late 1988 and early 1989 that renewed private settlement negotiations between SOCM and the Secretary of the Interior, in which NCA/AMC were not permitted to participate, might spawn regulations and a private agreement of nationwide scope that would threaten law-abiding companies with sanctions based on violations by others. Even the district court found NCA/AMC's motion to intervene in 1989 timely, because only then were their interests affected.

3. Petitioner's statement of the case attempts to undermine the court of appeals' decision by distorting the record. Purporting to state the parties' positions with respect to NCA/AMC's preliminary motion below to vacate the district court's decision for lack of jurisdiction, Petitioner attributes to the Secretary the view that "ju-

risdiction had been proper in the district court," and charges that the Secretary "reversed himself" in briefing on the merits, where he joined NCA/AMC in opposing jurisdiction. Pet. at 7. In fact, the Secretary opposed our preliminary motion on procedural and jurisprudential grounds, but took *no* substantive position on the jurisdictional issue, recommending that if the court wished to consider it, it should do so during briefing on the merits of NCA/AMC's challenge to the Settlement Agreement. Opposition of the Secretary of the Interior to Motion to Vacate Judgment for Lack of Jurisdiction (Jan. 18, 1991) at 9-13. On September 16, 1991, the court denied the motion to vacate, and directed the parties to include in their briefs the arguments raised in the motion rather than incorporate those arguments by reference.

REASONS FOR DENYING THE WRIT

The petition should be denied because the premise on which it rests—that the decision below "destroys nationwide pattern and practice suits that have been routinely approved and resolved by federal courts for years," Pet. at 8—is legally and factually incorrect. To force the decision below into the rubric of Rule 10.1(c), Petitioner has had to distort it beyond recognition, inflating it from a ruling construing the specific, indeed unique, language of one provision of a single statute—SMCRA—into an edict that controls citizen suits under any provision of the United States Code. From that premise, Petitioner predicts doom for the federal court system. It claims that the decision below will lead to "a multitude of duplicative lawsuits across the country," Pet. at 8, as though a supposed threat of the proverbial flood of litigation could override a legislatively established scheme for seeking judicial relief, without regard to the many procedural devices available—if in fact any were truly needed —to minimize or avoid needlessly duplicative litigation.

Petitioner's final argument is purely policy-based and for that reason is not fit for judicial resolution, and in any event rests on a fanciful and misleading account of alleged Congressional and administrative support for this litigation and of the court of appeals' assessment of that alleged support. Under the rules of this Court, these inaccuracies alone are sufficient reason for denying the petition. Sup. Ct. R. 14.5. Petitioner in effect seeks to use certiorari to resurrect an unprecedented use of the federal judiciary to empower a private special interest group to enjoy a specially privileged role in the administration of a federal agency. The petition should be denied.

THIS CASE IS NOT WORTHY OF SUPREME COURT REVIEW

A. The Decision Below Does Not Preclude Pattern And Practice Suits

The decision below concerned the interpretation of a single provision of a single federal statute—§ 520(c)(1) of SMCRA, which provides:

> Any action respecting a violation of this Act or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

30 U.S.C. § 1270(c)(1) (1988). The nature and scope of the decision below are clear from the court's statement of its holding:

> Recognizing that the statutory construction question is close, we hold that the special forum rule contained in SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1), controls all citizen suits described in SMCRA § 520(a), 30 U.S.C. § 1270(a), and is not confined to suits directed primarily against mine operators. We further hold that the rule is not waivable.

963 F.2d at 1543, Pet. App. at 4a. The court repeated the same narrow holding at the conclusion of the decision

and added a further limitation that the ruling covered only the renewal of Petitioner's citizen suit in 1989 and the ensuing district court approval of the 1990 Settlement Agreement, and not the consent decree entered in 1985 following Petitioner's original settlement agreement with the Secretary. 963 F.2d at 1552, Pet. App. at 21a-22a.

Like a blowfish seeking to ward off enemies, Petitioner labors mightily to engorge this statute-specific ruling into precedent for all citizen suits under any federal statute. The terms of the holding below, however, and the unique wording of SMCRA § 520(c)(1), foreclose such a change.

The court below correctly found that significant differences between the citizen suit provision of SMCRA and its closest analogues in other statutes—§ 304 of the Clean Air Act ("CAA"), 42 U.S.C. § 7604 (1988), and § 505 of the Federal Water Pollution Control Act ("FWPCA" or "Clean Water Act"), 33 U.S.C. § 1365 (1988)—made those statutes inapposite to the interpretation of SMCRA § 520(c)(1). 963 F.2d at 1546-48, Pet. App. at 10a-14a. Although Petitioner argues that these other citizen suit provisions are "virtually" identical to SMCRA's, Pet. at 12, it is the "virtually" that sets them apart. If the provisions were *truly* identical to SMCRA's, SMCRA § 520(c)(1) would have expressly limited the forum to suits for certain types of violations —violations of permits, regulations, or performance standards—to parallel the CAA's limitation to violations of emission standards, 42 U.S.C. § 7604(c)(1), and the FWPCA's limitation to violations of effluent standards, 33 U.S.C. § 1365(c)(1).

Achieving this parallel would not have been difficult. Congress could readily have described a limited class of violations, but *it did not do so*, and instead used broader language encompassing "any action respecting *a violation of this Act*." 30 U.S.C. § 1270(c)(1) (1988) (em-

phasis added).[1] As the court of appeals found, this language "does not provide for choice," 963 F.2d at 1550, Pet. App. at 18a, and its clarity obviates the need to resort even to legislative history, let alone to more remote extrinsic sources such as "virtually" identical provisions of other statutes. *See Rubin v. United States*, 449 U.S. 424, 430 (1981) ("when we find the terms of a statute unambiguous, judicial inquiry is complete, 'except in rare and exceptional circumstances' ") (citations omitted).[2]

A necessary consequence of the statute-specific nature of the ruling is that the court of appeals' decision cannot be binding precedent for cases involving citizen suits under statutes other than SMCRA.[3] In this respect, the

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[1] Petitioner cannot deny that its suit challenged an alleged "violation of this Act": its Complaint in the district court repeatedly used the word "violation" to describe the Secretary's conduct which it challenged. *See* 963 F.2d at 1549, Pet. App. at 16a.

[2] There is, in any case, no legislative history that supports Petitioner's strained reading. On the contrary, the House Committee expressed a clear preference for resolving SMCRA disputes locally. *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 177 (1977) (except for approvals of state programs and national rulemakings, "[a]ll other orders or decisions of the Secretary are subject to review in the U.S. district court in the locality in which the surface coal mining operation is located"). Moreover, SMCRA citizen suits were tied to "various *local* and *regional* considerations," not national, programmatic concerns. *Id.* at 88 (emphasis added).

[3] Thus, Petitioner's litany of cases allegedly involving "pattern and practice lawsuits" under other statutes, Pet. of 9-10, is not germane. By Petitioner's own admission, Pet. at 10, all but two of the cases involved citizen suits under the Clean Air Act or Clean Water Act, whose citizen suit provisions the court of appeals found distinguishable from SMCRA's. The other two cases are even less relevant. *National Black Police Ass'n v. Velde*, 712 F.2d 569 (D.C. Cir. 1983), was an action for declaratory and injunctive relief and compensatory and punitive damages brought by six blacks and six women who alleged that they had been denied employment, passed over for promotion, or discharged solely on the basis of race or sex by state or local law enforcement agencies that received fed-

petition embodies a glaring omission, for its fails to identify any previously maintainable SMCRA citizen suit (other than the instant litigation) that the court of appeals' decision would have newly foreclosed. Indeed, Petitioner fails to point out that the decision below is consistent not only with the D.C. Circuit's own prior rulings involving SMCRA § 520, but also with other courts' interpretations of that provision. As the court explained, it had previously held that a SMCRA citizen suit counterclaim could not be entertained in the District of Columbia, because under § 520(c)(1), such a suit "may be maintained *only* in the district where the mines in question are located." 963 F.2d at 1550-51, Pet. App. at 19a (discussing *New Mexico ex rel. Energy and Minerals Dep't v. U.S. Dep't of Interior*, 820 F.2d 441 (D.C. Cir. 1987)). The D.C. Circuit also reached the same conclusion about § 520(c)(1) on the only other occasion it has construed the provision—in the panel decisions that were automatically vacated when the court granted rehearing *en banc* in this and a companion case. *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422 (D.C. Cir.), *reh'g granted, opinion vacated* (1984); *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d

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eral funds. *See National Black Police Ass'n v. Velde*, 631 F.2d 784, 785 n.1 (D.C. Cir. 1980), *vacated and remanded*, 458 U.S. 591 (1982). The alleged failure of "enforcement" consisted only of the Law Enforcement Assistance Administration's decision not to terminate grants to the state or local agencies. Because the court found no mandatory duty to "enforce" by terminating the grant, it never reached the permissible breadth of relief that the plaintiffs were entitled to seek. *See* 712 F.2d at 574-77. Likewise, *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) was not a citizen suit, but an appeal from a final order of the FCC in a licensing action. The appellants sought reversal of the order because, *inter alia*, the FCC had allegedly failed to enforce a provision of the Clayton Act. *See id.* at 75-76. The mere raising of the argument did not, however, as Petitioner suggests, convert the appeal, which was brought by the licensee's competitors and the Department of Justice, into a citizen suit.

1434 (D.C. Cir.), *reh'g granted, opinion vacated* (1984), Pet. App. at 46a. Given the D.C. Circuit's consistent rulings on the issue, it is no surprise at all—and strong indication of lack of certworthiness—that on suggestion for rehearing *en banc*, SOCM garnered *no* votes at all. Order (Aug. 18, 1992), Pet. App. at 54a.

The decision below by its very terms fully maintained the uniformity of all the D.C. Circuit's decisions, as well as consistency with other courts' interpretations of § 520(c)(1) and related jurisdictional provisions in SMCRA. *See* 963 F.2d at 1549-50, Pet. App. at 17a (citing *National Wildlife Fed'n v. Hodel*, 661 F. Supp. 473 (E.D. Ky. 1987) (dismissing citizen suit against Secretary under SMCRA § 520(a)(2) because plaintiffs failed to identify specific mining operations located in that judicial district and thus failed to satisfy forum requirement of § 520(c)(1)); *Oklahoma Wildlife Fed'n v. Hodel*, 642 F. Supp. 569 (N.D. Okla. 1986) (§ 520(a)(2) only authorizes court to compel Secretary to take *some* action, and does not provide for judicial review of action taken; narrow reading appropriate in view of *Heckler v. Chaney*, 470 U.S. 821 (1985))). Moreover, it maintained uniformity with decisions of the Fourth, Eleventh, and Federal Circuits concerning SMCRA's scheme for apportioning judicial review among different courts, and reserving to the District of Columbia only review of national rulemakings under § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1988), which, like § 520(c)(1), contains a mandatory forum provision with no allowance for alternative forums. 963 F.2d at 1550, Pet. App. at 17a-18a (collecting cases). Indeed, the decision below not only maintained uniformity with all the others, but in fact *achieved* uniformity by effectively overruling the *only* decision ever to reach a contrary conclusion—the 1982 ruling of the district court in this case. *Save Our Cumberland Mountains, Inc. v. Watt*, 550 F. Supp. 979 (D.D.C. 1982), Pet. App. at 33a.

Nor will the decision below cause the dire consequences Petitioner predicts. Petitioner speaks of the demise of pattern and practice suits, but nothing in the decision below would preclude the bringing of multiple pattern and practice suits under SMCRA in one or more "judicial district[s] in which the surface coal mining operation[s] complained of [are] located." 30 U.S.C. § 1270(c)(1) (1988). Petitioner in essence seeks not an interpretation of an existing statutory provision, but the judicial creation of an entirely new cause of action that Congress never authorized—a single-forum, programmatic SMCRA citizen suit for judicial oversight of the Executive Branch's enforcement of SMCRA—plus the creation of an entirely new forum for such suits in the District of Columbia.[4] Plainly, SMCRA does not authorize such suits.[5] Any such authorization must come from Congress, not the courts. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3191 (1990) (although "understandably frustrating" to environmentalist organization with nationwide, programmatic objectives, case-by-case approach is the norm, "[e]xcept where Congress explicitly provides

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[4] Petitioner envisions such suits for cases where "no site-specific facts are involved." Pet. at 13. Petitioner offers no support, however, for implying that this case (or any other SMCRA citizen suit, for that matter) involves no site-specific facts. Indeed, there can be no such support, for, as the court of appeals found, "[a] charge that the Secretary is failing to enforce the Act must be earth-bound" and "must rest on proof that mine operators, at specific locations, are evading the terms of the Act, and are thus 'adversely affecting' the interests of the complaining persons." 963 F.2d at 1549, Pet. App. at 16a.

[5] Congress clearly knew how to authorize nationwide citizen suits under environmental statutes and provide a forum in the District of Columbia when it saw fit. *See* 42 U.S.C. § 6972(a) (1988) (Resource Conservation and Recovery Act) and 15 U.S.C. § 2619(a) (1988) (Toxic Substances Control Act) (both expressly providing for venue for nationwide citizen suits in the District of Columbia). The express provisions of those statutes make SMCRA's silence all the more compelling.

for our correction of administrative process at a higher level of generality").[6]

B. Petitioner's Speculation About Duplicative Litigation Under Environmental Statutes Is Unfounded And In Any Event Cannot Supersede The Plain Language Of SMCRA § 520(c)(1)

Petitioner's second overstatement of the consequences of the decision below predicts "critical overload" for the federal court system, as district courts "waste . . . scarce judicial resources" after being inundated with "numerous identical lawsuits" not only under SMCRA, but also under "other major environmental statutes." Pet. App. at 14-16. As we have explained, there is no basis for extending the decision below as binding precedent in non-SMCRA cases, so a substantial share of Petitioner's argument must be discounted for that reason alone. Moreover, as to SMCRA cases, the court below did not construe § 520(c)(1) to require that a separate citizen suit be brought for each cause of action, but only that the forum for the suit be the judicial district in which complained-of mining operations are located. Nothing

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[6] Petitioner effectively concedes the point by quoting the same passage from *Lujan*. Pet. at 11. Petitioner apparently believes, however, that Congress *has* "explicitly provide[d]" for such an exception in § 520(a)(2) of SMCRA. But § 520(a)(2) merely authorizes the bringing of citizen suits against the Secretary or state regulatory authority for failing to perform a mandatory duty under the Act; it is entirely silent as to the "level of generality" such suits might take. Petitioner gains nothing in this connection by relying on *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990), Pet. at 11, in which the court in *dicta* referred to the citizen suit provisions of the Clean Air Act and Clean Water Act but said nothing about SMCRA. Of greater significance here, *Cavazos* held that the plaintiffs in that case could not maintain their programmatic challenge to enforcement of civil rights laws, but had to proceed case-by-case even though it may be "more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement." *Id.* at 751-52.

in the decision below precludes the joining of multiple common-issue causes of action in a single case, or the consolidation of multiple cases presenting common issues, provided, of course, that the plaintiffs do what SOCM did not do here—bring suit in the district in which the allegedly errant mines are located. Indeed, even if the cases originate in multiple districts, a variety of measures (none of them cited by Petitioner) are available to minimize duplicative litigation and conserve the resources of the courts and the parties as well. *See, e.g., Manual for Complex Litigation, Second* (1985); 28 U.S.C. § 1407 (1988) (coordinated or consolidated pretrial proceedings of actions brought in different districts); Fed. R. Civ. P. 42(a) (consolidation of actions involving a common question of law or fact).[7]

Even if an increase in district court caseload in SMCRA cases would occur (and there is no reason to expect anything of the sort), it cannot supersede § 520(c)(1)'s plain command that the action be brought "only in the judicial district in which the surface coal mining operation is located." 30 U.S.C. § 1270(c)(1) (1988). The "burden" of multiple cases to which Petitioner alludes is not extraordinary, but rather "is the traditional, and remains the normal, mode of operation of the courts," *Lujan v. National Wildlife Fed'n*, 110 S. Ct. at 3191, to which Congress created no exception in § 520 of SMCRA. Petitioner in essence asks that courts be empowered to supersede Congress' express judicial remedies whenever their prophesied workloads require it. That alleged burden, however, would not permit overriding the will of Congress, as the court below correctly found. 963 F.2d at 1543-44, Pet. App. at 4a. *See Lujan v. National*

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[7] Moreover, the court of appeals' decision has the salutary effect of requiring citizens to sue promptly as they perceive problems arise, rather than wait until they recur "at least 700 times," as SOCM's Complaint put it, and then aggregating them all to allege a "pattern and practice" violation of nationwide scope.

Wildlife Fed'n, 110 S. Ct. at 3191; *Women's Equity Action League v. Cavazos*, 906 F.2d at 751.[8]

While dwelling on this "incredible burden," Pet. at 14, Petitioner neglects to mention the one burden that *is* relevant to, and dispositive of, the interpretation of § 520(c)(1)—the burden that the single district court would bear if it had to oversee a settlement agreement "as far-reaching as SOCM's." 763 F.2d at 1552, Pet. App. at 21a. That burden would entail monitoring not only the Secretary's enforcement efforts against the more than 700 unspecified operators covered by SOCM's complaint, but also his development of the AVS (itself a complicated, computerized cross-checking mechanism involving multiple databases), and his use of the AVS in reviewing all existing SMCRA permits as well as all permit applications. Given these substantial burdens, it is not at all clear, as Petitioner seems to assume, that a nationwide suit would remedy SOCM's grievances more effectively than smaller-scale local actions. *See Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1532 (D.C. Cir. 1983) (*en banc*). Moreover, such a burden would offend the principle of separation of powers, because "it would empower one district judge to act as supreme supervisor of [the agency's] enforcement activities—a role more appropriately reserved for the Executive under the oversight of Congress." *Id.* Thus, the court below properly identified

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[8] In *Cavazos*, an action for relief under civil rights law, the D.C. Circuit explained:

> Suits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement. But under our precedent, situation-specific litigation affords an adequate, even if imperfect, remedy. So far as we can tell, the suit targeting specific discriminatory acts of fund recipients is the *only court remedy Congress has authorized* for private parties . . . .

906 F.2d at 751 (emphasis added).

separation of powers as its "fundamental consideration" in construing § 520(c)(1) and properly declined to let its district court "engage long-term in grand-scale supervision of an executive agency's administration of federal programs." 963 F.2d at 1543, 1551, Pet. App. at 4a, 20a.

C. Petitioner's Policy Argument Is Factually Misleading And Legally Irrelevant

Petitioner's final argument—that the Court should grant certiorari because of the case's alleged importance to the country's environmental welfare, Pet. at 16-17—raises a pure question of policy that is fit for resolution by the Legislative Branch, not this Court. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 864 (1984). For this reason alone, the argument provides no basis for any judicial resolution, let alone a grant of certiorari.

Indeed, Petitioner apparently recognizes as much and attempts to compensate by suggesting (1) that this litigation and the 1990 Settlement Agreement bear Congress' imprimatur, so that the legislative question is settled; (2) that the court below recognized (and therefore should have given weight to) the reputed legislative "approval"; and (3) that Secretary Lujan himself spoke favorably of the Settlement Agreement, so that the administrative policy question is also settled. Pet. at 17 & n.11. Each of Petitioner's points is misleading and provides a separate basis for denying the petition under Rule 14.5 of this Court.

First, although, as Petitioner states, Congress in the past allocated funds to implement the 1985 consent decree and the 1990 Settlement Agreement, those appropriations measures do not tell the whole story, nor do they represent Congress' last word on this lawsuit. The comprehensive energy legislation enacted in the current session of Congress originally contained provisions that would have incorporated the terms of the 1990 SOCM Settlement Agreement into SMCRA and would also have

amended § 520(c)(1) to eliminate the provision requiring suit to be brought in the district in which the complained-of mining operation is located.[9] But both provisions proved controversial, were dropped by the House during floor consideration, and were not part of the final enactment. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XXV, 106 Stat. 2776 (1992). Support for the court of appeals' decision and opposition to Petitioner's interpretation of § 520(c)(1) were clear:

> I would like to bring to my colleagues' attention the recent decision of the U.S. Court of Appeals for the District of Columbia in the Save Our Cumberland Mountains versus Lujan case. The court agreed with the administration that citizen suits under the Surface Mining Act must be brought in the judicial district where the harm is alleged, not in Washington, D.C. I quote, "A charge that the Secretary is failing to enforce the act must be earthbound." In other words, let's not encourage judge-shopping by a small cadre of DC-based lawyers adept at using these provisions to halt coal development at every turn. If a violation is not being enforced in West Virginia, then bring a suit in Federal Court in West Virginia, not here.

138 Cong. Rec. H3768 (daily ed. May 27, 1992) (statement of Rep. Vucanovich).[10] Thus, although Congress

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[9] As reported out of the House Committee on Interior and Insular Affairs, the bill would have amended § 520(c)(1) to read:

> Any pending or future action brought under this section may be brought in any judicial district where venue is proper under title 28 U.S.C. 1391. In granting relief or approving or reviewing any settlement in any pending or future action under this section, the courts shall afford the relief necessary to achieve full compliance with the Act and regulations.

Comprehensive National Energy Policy Act, H.R. 776, 102d Cong., 2d Sess. § 2805(c)(2) (1992), *reprinted in* H.R. Rep. No. 474, 102d Cong., 2d Sess., Part 8 at 39 (1992).

[10] As to the proposed amendment enacting the Settlement Agreement, see 138 Cong. Rec. H3773 (daily ed. May 27, 1992) (state-

may have been willing to fund implementation of the Settlement Agreement so long as it reflected the district court's approval, Congress' refusal to amend § 520 in the face of the court of appeals' ruling demonstrates Congress' satisfaction with the court's interpretation and not, as Petitioner implies, an endorsement of Petitioner's contrary view. *See CBS, Inc. v. FCC*, 453 U.S. 367, 385 (1981).

Second, the court below did not, as Petitioner implies, attach any weight to Congress' earlier appropriations measures. Petitioner quotes the court below as recognizing "the legislature's approval of the AVS project," Pet. at 17, but that quote, when placed in its context, makes clear that the court *disagreed* with SOCM's assessment of the appropriations measures:

> We have taken into account SOCM's suggestion that Congress, by repeatedly allocating funds for the Secretary's compliance with the court-entered settlement agreements, *see supra* note 5, has effectively matched SMCRA § 520(c)(1) with "(a)(1)" actions and authorized recourse to 28 U.S.C. § 1391 for "(a)(2)" suits. *We do not read so much into the appropriations measures, for there is no indication that they stand for anything more than Congress' readiness to enable the Secretary to comply with court orders and perhaps the legislature's approval of the AVS project.*

963 F.2d at 1549, Pet. App. at 16a-17a (emphasis added). The court's refusal to "read so much into the appropriations measures" reflects settled law, *see Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978), making all the more egregious Petitioner's failure to present the court's statement "with accuracy" as required by Rule 14.5.

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ment of Rep. Lent) ("The most objectionable provisions, those dealing with replacement of water, leasing of the naval oil shale reserves, and other provisions incorporating the settlement of an agreement in a recent lawsuit have now been removed").

Third, Petitioner incorrectly implies that the Settlement Agreement enjoys Secretary Lujan's approval, quoting his favorable statement in a departmental news release issued on January 24, 1990, the date the Agreement was signed. Pet. at 17 n.11. But it is one thing for the head of an agency to express optimism at the outset of a new venture and not to realize a mistake has been made, and quite another to retain that outlook after two years' actual experience with the new scheme. Agency positions are "not carved in stone," *Chevron*, 467 U.S. at 863-64, but can change as the agency's experience dictates. Experience taught *this* agency that the Settlement Agreement was unworkable. In a statement of position in 1992 which Petitioner does not cite, Secretary Lujan opposed the legislation that would have incorporated the Settlement Agreement into the Surface Mining Act, because the codification of the Agreement "would create an unwarranted and inflexible regulatory straightjacket for the responsible federal agency." Letter from Interior Secretary Lujan to Rep. George Miller, Chairman, House Committee on Interior and Insular Affairs, enclosure at 4 (Apr. 7, 1992). The agency approval that Petitioner touts does not exist, and the Court should not, by granting certiorari, enter the policy arena as if it did.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

Of Counsel:
WILLIAM E. HYNAN
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

EDWARD M. GREEN
STUART A. SANDERSON
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

JOHN A. MACLEOD *
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500
Attorneys for Respondents National Coal Association and American Mining Congress

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* Counsel of Record